

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

APRIL BEYRENT,

Plaintiff,

V.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security
Administration,

Defendant.

Case No. 2:17-cv-02446-JAD-CWH

AMENDED REPORT AND RECOMMENDATION

Defendant

This matter was referred to the undersigned magistrate judge for a report of findings and recommendations under 28 U.S.C. § 636(b)(1)(B)-(C) and Local Rule IB 1-4. The case involves review of an administrative action by the Commissioner of Social Security (“Commissioner”) denying Plaintiff April Beyrent’s (“Plaintiff”) application for disability insurance benefits under Title II of the Social Security Act (“the Act”). The court has reviewed Plaintiff’s motion for reversal or to remand (ECF No. 22), filed April 3, 2018, and the Commissioner’s response and cross-motion to affirm (ECF Nos. 26, 25), filed June 4, 2018, and Plaintiff’s reply (ECF No. 27), filed June 25, 2018.

I. BACKGROUND

1. Procedural History

On March 17, 2014, Plaintiff applied for disability insurance benefits under Title II of the Act, alleging an onset date of August 20, 2013. AR¹ 138-146. Plaintiff's claim was denied initially, and on reconsideration. AR 96-99. A hearing was held before an Administrative Law Judge ("ALJ") on November 25, 2015. AR 50-82. On March 9, 2016, the ALJ issued a decision

¹ AR refers to the Administrative Record in this matter. (Notice of Manual Filing (ECF No. 13).)

1 finding Plaintiff was not disabled. AR 29-45. The ALJ's decision became the Commissioner's
2 final decision when the Appeals Council denied review. AR 4-11. Plaintiff, on September 19,
3 2017, commenced this action for judicial review under 42 U.S.C. §§ 405(g). (*See* Compl. (ECF
4 No. 4).)

5 **2. The ALJ Decision**

6 The ALJ followed the five-step sequential evaluation process set forth in 20 C.F.R.
7 §§ 404.1520 and 416.920. AR 32-34. At step one, the ALJ found that Plaintiff had not engaged
8 in substantial gainful activity from the alleged onset date of August 20, 2013 through her date last
9 insured of December 31, 2014. AR 34. At step two, the ALJ found that Plaintiff had medically
10 determinable "severe" impairments of degenerative disc disease. *Id.* At step three, the ALJ
11 found that Plaintiff did not have an impairment or combination of impairments that met or
12 medically equaled a listed impairment in 20 C.F.R. Part 404, Subpart P, Appendix 1. AR 34-35.
13 At step four, the ALJ found that Plaintiff has the residual functional capacity to perform sedentary
14 work as defined in 20 C.F.R. §§ 404.1567(a) except that she cannot climb ladders or scaffolds
15 and can only occasionally stoop, kneel, crouch, crawl, and climb stairs. She needs to alternate
16 sitting and standing approximately every 30 minutes. *Id.* The ALJ found that Plaintiff is unable
17 to perform any past relevant work. AR 39. Plaintiff was born on August 18, 1973 and was 41
18 years old, which is defined as a younger individual age 18-44 on the date last insured. *Id.*
19 Plaintiff has at least a high school education and is able to communicate in English. *Id.*
20 Transferability of job skills is not material to the determination of disability. *Id.* Through the
21 date last insured, considering the claimant's age, education, work experience, and the residual
22 functional capacity, there are jobs that exist in significant numbers in the national economy that
23 the claimant could have performed. *Id.* Accordingly, the ALJ concluded that Plaintiff was not
24 under a disability at any time from August 20, 2013, through December 31, 2014, the date last
25 insured. AR 40.

26 //

27 //

28 //

1 **II. DISCUSSION**

2 **1. Standard of Review**

3 Administrative decisions in social security disability benefits cases are reviewed under 42
 4 U.S.C. § 405(g). *See Akopyan v. Barnhart*, 296 F.3d 852, 854 (9th Cir. 2002). Section 405(g)
 5 states: “Any individual, after any final decision of the Commissioner of Social Security made
 6 after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a
 7 review of such decision by a civil action . . . brought in the district court of the United States for
 8 the judicial district in which the plaintiff resides.” The court may enter “upon the pleadings and
 9 transcripts of the record, a judgment affirming, modifying, or reversing the decision of the
 10 Commissioner of Social Security, with or without remanding the cause for a rehearing.” *Id.* The
 11 Ninth Circuit reviews a decision affirming, modifying, or reversing a decision of the
 12 Commissioner de novo. *See Batson v. Comm’r*, 359 F.3d 1190, 1193 (9th Cir. 2004).

13 The Commissioner’s findings of fact are conclusive if supported by substantial evidence.
 14 *See* 42 U.S.C. § 405(g); *Ukolov v. Barnhart*, 420 F.3d 1002 (9th Cir. 2005). However, the
 15 Commissioner’s findings may be set aside if they are based on legal error or not supported by
 16 substantial evidence. *See Stout v. Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050, 1052 (9th Cir.
 17 2006); *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). The Ninth Circuit defines
 18 substantial evidence as “more than a mere scintilla but less than a preponderance; it is such
 19 relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”
 20 *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995); *see also Bayliss v. Barnhart*, 427 F.3d
 21 1211, 1214 n.1 (9th Cir. 2005). In determining whether the Commissioner’s findings are
 22 supported by substantial evidence, the court “must review the administrative record as a whole,
 23 weighing both the evidence that supports and the evidence that detracts from the Commissioner’s
 24 conclusion.” *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998); *see also Smolen v. Chater*, 80
 25 F.3d 1273, 1279 (9th Cir. 1996).

26 Under the substantial evidence test, findings must be upheld if supported by inferences
 27 reasonably drawn from the record. *Batson*, 359 F.3d at 1193. When the evidence will support
 28 more than one rational interpretation, the court must defer to the Commissioner’s interpretation.

1 See *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005); *Flaten v. Sec'y of Health and Human*
 2 *Serv.*, 44 F.3d 1453, 1457 (9th Cir. 1995). Consequently, the issue before the court is not whether
 3 the Commissioner could reasonably have reached a different conclusion, but whether the final
 4 decision is supported by substantial evidence. It is incumbent on the ALJ to make specific
 5 findings so that the court does not speculate as to the basis of the findings when determining if the
 6 Commissioner's decision is supported by substantial evidence. Mere cursory findings of fact
 7 without explicit statements as to what portions of the evidence were accepted or rejected are not
 8 sufficient. *Lewin v. Schweiker*, 654 F.2d 631, 634 (9th Cir. 1981). The ALJ's findings "should
 9 be as comprehensive and analytical as feasible, and where appropriate, should include a statement
 10 of subordinate factual foundations on which the ultimate factual conclusions are based." *Id.*

11 **2. Disability Evaluation Process**

12 The individual seeking disability benefits has the initial burden of proving disability.
 13 *Roberts v. Shalala*, 66 F.3d 179, 182 (9th Cir. 1995). To meet this burden, the individual must
 14 demonstrate the "inability to engage in any substantial gainful activity by reason of any medically
 15 determinable physical or mental impairment which can be expected . . . to last for a continuous
 16 period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). More specifically, the individual
 17 must provide "specific medical evidence" in support of her claim for disability. 20 C.F.R.
 18 § 404.1514. If the individual establishes an inability to perform her prior work, then the burden
 19 shifts to the Commissioner to show that the individual can perform other substantial gainful work
 20 that exists in the national economy. *Reddick*, 157 F.3d at 721.

21 The ALJ follows a five-step sequential evaluation process in determining whether an
 22 individual is disabled. See 20 C.F.R. § 404.1520; *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987). If
 23 at any step the ALJ determines that he can make a finding of disability or nondisability, a
 24 determination will be made and no further evaluation is required. See 20 C.F.R. §
 25 404.1520(a)(4); *Barnhart v. Thomas*, 540 U.S. 20, 24 (2003). Step one requires the ALJ to
 26 determine whether the individual is engaged in substantial gainful activity ("SGA"). 20 C.F.R. §
 27 404.1520(b). SGA is defined as work activity that is both substantial and gainful; it involves
 28 doing significant physical or mental activities usually for pay or profit. *Id.* § 404.1572(a)-(b). If

1 the individual is engaged in SGA, then a finding of not disabled is made. If the individual is not
 2 engaged in SGA, then the analysis proceeds to the step two. Step two addresses whether the
 3 individual has a medically determinable impairment that is severe or a combination of
 4 impairments that significantly limits her from performing basic work activities. *Id.*
 5 § 404.1520(c). An impairment or combination of impairments is not severe when medical and
 6 other evidence establishes only a slight abnormality or a combination of slight abnormalities that
 7 would have no more than a minimal effect on the individual's ability to work. *Id.* § 404.1521; *see*
 8 *also* Social Security Rulings ("SSRs") 85, 96-3p, and 96-4p.² If the individual does not have a
 9 severe medically determinable impairment or combination of impairments, then a finding of not
 10 disabled is made. If the individual has a severe medically determinable impairment or
 11 combination of impairments, then the analysis proceeds to step three.

12 Step three requires the ALJ to determine whether the individual's impairments or
 13 combination of impairments meet or medically equal the criteria of an impairment listed in 20
 14 C.F.R. Part 404, Subpart P, Appendix 1. 20 C.F.R. §§ 404.1520(d), 404.1525, and 404.1526. If
 15 the individual's impairment or combination of impairments meet or equal the criteria of a listing
 16 and the duration requirement (20 C.F.R. § 404.1509), then a finding of disabled is made. 20
 17 C.F.R. § 404.1520(h). If the individual's impairment or combination of impairments does not
 18 meet or equal the criteria of a listing or meet the duration requirement, then the analysis proceeds
 19 to step four.

20 Before moving to step four, however, the ALJ must first determine the individual's
 21 residual functional capacity ("RFC"), which is a function-by-function assessment of the
 22 individual's ability to do physical and mental work-related activities on a sustained basis despite
 23 limitations from impairments. *See* 20 C.F.R. § 404.1520(e); *see also* SSR 96-8p. In making this
 24 finding, the ALJ must consider all the relevant evidence, such as all symptoms and the extent to
 25

26 ² SSRs constitute the SSA's official interpretation of the statute and regulations. *See Bray v. Comm'r of*
 27 *Soc. Sec. Admin.*, 554 F.3d 1219, 1224 (9th Cir. 2009); *see also* 20 C.F.R. § 402.35(b)(1). They are
 28 entitled to some deference as long as they are consistent with the Social Security Act and regulations.
Bray, 554 F.3d at 1223 (finding ALJ erred in disregarding SSR 82-41).

1 which the symptoms can reasonably be accepted as consistent with the objective medical
2 evidence and other evidence. 20 C.F.R. § 404.1529; *see also* SSRs 96-4p and 96-7p. To the
3 extent that statements about the intensity, persistence, or functionally limiting effects of pain or
4 other symptoms are not substantiated by objective medical evidence, the ALJ must make a
5 finding on the credibility of the individual's statements based on a consideration of the entire case
6 record. The ALJ must also consider opinion evidence in accordance with the requirements of 20
7 C.F.R. § 404.1527 and SSRs 96-2p, 96-5p, 96-6p, and 06-3p.

8 Step four requires the ALJ to determine whether the individual has the RFC to perform
9 her past relevant work ("PRW"). 20 C.F.R. § 404.1520(f). PRW means work performed either
10 as the individual actually performed it or as it is generally performed in the national economy
11 within the last 15 years or 15 years before the date that disability must be established. In
12 addition, the work must have lasted long enough for the individual to learn the job and performed
13 a SGA. 20 C.F.R. §§ 404.1560(b) and 404.1565. If the individual has the RFC to perform her
14 past work, then a finding of not disabled is made. If the individual is unable to perform any PRW
15 or does not have any PRW, then the analysis proceeds to step five.

16 The fifth and final step requires the ALJ to determine whether the individual is able to do
17 any other work considering her RFC, age, education, and work experience. 20 C.F.R.
18 § 404.1520(g). If she is able to do other work, then a finding of not disabled is made. Although
19 the individual generally continues to have the burden of proving disability at this step, a limited
20 burden of going forward with the evidence shifts to the Commissioner. The Commissioner is
21 responsible for providing evidence that demonstrates that other work exists in significant numbers
22 in the national economy that the individual can do. *Yuckert*, 482 U.S. at 141-42.

23 **3. Analysis**

24 **a. Whether the ALJ properly rejected Dr. Weingarten's opinion**

25 Plaintiff first moves to remand this matter because the ALJ improperly rejected the
26 opinions of Dr. Weingarten. Plaintiff argues that the ALJ's finding is an improper medical
27 finding, and that the ALJ improperly substituted his judgment for that of the physician. The
28 Commissioner responded that ALJ properly evaluated the opinion. In evaluating medical

1 opinions, the ALJ must provide “clear and convincing” reasons supported by substantial evidence
2 for rejecting the uncontradicted opinion of an examining physician. *Lester v. Chater*, 81 F.3d
3 821, 830-831 (9th Cir. 1995).

4 At the hearing, the ALJ decided to refer Plaintiff to a physician to obtain a report
5 regarding Plaintiff’s limitations, and to obtain additional medical records. AR 71. Dr.
6 Weingarten was the consultative examiner who provided a report, and opined that Plaintiff
7 retained a fairly restrictive RFC. AR 38. Although there was no evidence that the opinion was
8 contradicted, the ALJ gave little weight to Dr. Weingarten’s opinions, indicating that the opinion
9 is a reflection of the claimant’s current functioning and not of the claimant’s functioning at the
10 time of the date last insured. *Id.*

11 The ALJ explained that in July 2013 (a month prior to her alleged onset date), claimant
12 sought treatment for lower back and hip pain. AR 36. She was 19 weeks pregnant at the time.
13 She received physical therapy, which noted that she had some impairment in strength, range of
14 motion, gait, balance, and functional mobility, but was also self-employed and working from
15 home. *Id.* After Plaintiff gave birth to the first of her two children in January 2014, she
16 complained of back pain, and she received epidural steroid injections which she claimed provided
17 tremendous pain relief. AR 36. Examinations showed she was much more comfortable with full
18 strength in her extremities, and she started working out at the gym in lieu of starting
19 recommended physical therapy. *Id.* She continued to receive injections in March, August, and
20 September 2014, and in October 2014, noted adequate pain management and increased activity
21 level, and treatment providers noted that she was stable on her current medication regimen and
22 that it had not changed in greater than six months. AR 36-37. Her function and activities of daily
23 living were also noted to have improved optimally on her current dose of medications. AR 37.
24 The ALJ explained that much of the evidence the claimant submitted was for treatment after
25 December 31, 2014, and that the records provided prior to that time were more persuasive for the
26 relevant time period. AR 37. He noted that not one of the claimant’s treating physician provided
27 a medical opinion on the claimant’s ability to perform work-related activities, nor is there any
28 opinion from a non-medical third party. The ALJ noted that nothing in any of the records from

1 those doctors indicated that claimant had any severe functional impairment which equated with a
2 disabling impairment. AR 38.

3 Plaintiff's eligibility for Plaintiff's date last insured was December 31, 2014. AR 34. To
4 obtain Title II Disability Insurance Benefits, Plaintiff must prove her eligibility before the
5 expiration of her insured status. *See Burch*, 400 F.3d at 679 (claimant must prove that she is
6 disabled before her insured status expires); *Vincent v. Heckler*, 739 F.2d 1393, 1394 (9th Cir.
7 1984) ("only disabilities existing before [a claimant's insured status expires] can trigger insurance
8 benefits"). Dr. Weingarten conducted his orthopedic consultative examination of Plaintiff in
9 January of 2016, but Plaintiff's date last insured was December 31, 2014. AR 34, 38. The doctor
10 noted that Plaintiff provided "minimal records" for his review. AR 38. The Commissioner notes
11 that Dr. Weingarten himself stated that, "[n]o," Plaintiff's limitations had not lasted for twelve
12 months, which it argues is an obvious contradiction that again suggests the doctor did not have
13 any real basis for rendering a retroactive opinion. *See* AR 774. The court finds this argument
14 persuasive. *See Tidwell v. Apfel*, 161 F.3d 599 (9th Cir. 1998) (where the doctor did not examine
15 claimant until more than a year after the expiration of her insured status, coupled with other
16 contradictory medical evidence, fully supported ALJ's determination that the doctor's
17 submissions were not convincing). The court finds that the ALJ provided "clear and convincing"
18 reasons supported by substantial evidence to reject Dr. Weingarten's opinion because it was not
19 reliable or probative for the period ending December 31, 2014.

20 **b. Plaintiff's credibility**

21 Plaintiff next moves to remand this matter because the ALJ improperly rejected Plaintiff's
22 pain and symptoms testimony. The ALJ found that claimant's statements concerning the
23 intensity, persistence and limiting effects of her symptoms are not entirely consistent with the
24 medical evidence and other evidence in the record. The Commissioner responds that the ALJ
25 properly found that Plaintiff's testimony was inconsistent with the record.

26 The Commissioner's regulations prohibit granting disability benefits based solely on a
27 claimant's subjective complaints. *See* 20 C.F.R. § 404.1529(a) ("statements about your pain or
28 other symptoms will not alone establish that you are disabled"). "An ALJ cannot be required to

1 believe every allegation of [disability], or else disability benefits would be available for the
 2 asking, a result plainly contrary to [the Act].” *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).
 3 If the ALJ rejects the claimant’s complaints, the ALJ must provide “clear and convincing
 4 reasons” for the disbelief.” *Burrell v. Colvin*, 775 F.3d 1133, 1136-37 (9th Cir. 2014).

5 The ALJ must state why the testimony is unpersuasive and must point to what specific
 6 testimony or evidence undermines the claimant’s testimony. *See Morgan v. Comm’r of Soc. Sec.*
 7 *Admin.*, 169 F.3d 595, 599 (9th Cir. 1999). Absent affirmative evidence that the claimant is
 8 malingering, the ALJ’s reasons for rejecting the claimant’s testimony must be clear and
 9 convincing. *Valentine v. Comm’r Social Sec. Admin.*, 574 F.3d 685, 693 (9th Cir. 2009). The
 10 ALJ “may not reject a claimant’s subjective complaints based solely on a lack of medical
 11 evidence to fully corroborate the alleged severity of pain.” *Burch*, 400 F.3d at 680. This is
 12 because the lack of an objective medical basis is just one factor in evaluating the credibility of a
 13 claimant’s testimony and complaints. *Seev Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991)
 14 (en banc).

15 The Ninth Circuit has upheld an ALJ’s finding that a claimant’s testimony is not credible
 16 when the ALJ cited specific instances in the record supporting this determination. *See, e.g.,*
 17 *Parra v. Astrue*, 481 F.3d 742, 750 (9th Cir. 2007) (upholding ALJ’s credibility determination
 18 when he pointed out numerous lab results that contradicted his subjective complaints). *See also,*
 19 *Batson*, 359 F.3d at 1196-97 (ALJ’s credibility determination upheld because the ALJ cited
 20 specific testimony from a doctor which contradicted the claimant’s allegations). But the Ninth
 21 Circuit has also found general findings insufficient. *See Robbins v. Social Sec. Admin.*, 466 F.3d
 22 880, 884-85 (9th Cir. 2006) (ALJ required to provide a “narrative discussion” and state specific
 23 evidence in the record supporting an adverse credibility finding). If “evidence can support either
 24 affirming or reversing the ALJ’s decision,” this Court may not substitute its judgment for that of
 25 the ALJ’s. *Id.* at 882.

26 //
 27 //
 28 //

1 In making a credibility determination regarding pain, the ALJ may consider:

2 1. [t]he nature, location, onset, duration, frequency, radiation, and intensity of any
 3 pain; 2. [p]recipitating and aggravating factors (e.g., movement, activity,
 4 environmental conditions); 3. [t]ype, dosage, effectiveness, and adverse side
 5 effects of any pain medication; 4. [t]reatment, other than medication, for relief of
 pain; 5. [F]unctional restrictions; and 6. [t]he claimant's daily activities[,]

6 along with "ordinary techniques of credibility evaluation." *Bunnell*, 947 F.2d at 346 (citing SSR
 7 88-13).

8 Here, the ALJ explained Plaintiff's inconsistent statements which undermined the
 9 credibility of her claims. AR 36. *See Molina v. Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012)
 10 ("ALJ may consider inconsistencies either in the claimant's testimony or between the testimony
 11 and the claimant's conduct[.]"). Plaintiff claimed that "she had stopped working . . . due to the
 12 inability to travel to events," but later admitted "she was able to travel with her husband who was
 13 self-employed." AR 37. Plaintiff claimed that she could not perform even a seated job because
 14 she would "have to move around all the time, stretch" and "could scream just out of nowhere"
 15 from her pain. AR 70. The ALJ noted that Plaintiff sat at the hearing for one hour without
 16 changing positions. AR 37. *See Matney v. Sullivan*, 981 F.2d 1016, 1020 (9th Cir. 1992) (when
 17 assessing credibility, the ALJ may consider the claimant's "demeanor and appearance at the
 18 hearing").

19 The ALJ also explained that in November 2013, Plaintiff was offered a referral to an
 20 interventional pain doctor to address her complaints, but Plaintiff declined, calling into question
 21 the degree of pain. AR 36. *See Chaudhry v. Astrue*, 688 F.3d 661, 672 (9th Cir. 2012) (quoting
 22 *Orn. v. Astrue*, 495 F.3d 625, 638 (9th Cir. 2007)) ("[I]f a claimant complains about disabling
 23 pain but fails to seek treatment, or fails to follow prescribed treatment, for the pain, an ALJ may
 24 use such failure as a basis for finding the complaint unjustified or exaggerated[.]"). Similarly, in
 25 January 2014, Plaintiff was offered physical therapy, but deferred, stating she had started working
 26 out in the gym. AR 36. Additionally, the ALJ noted that after receiving an injection treatment,
 27 Plaintiff reported that it "provided her with tremendous relief" and that she "is now almost off
 28 pain medications and is able to get around and look after her daughter much better in the past."

1 AR 544. *See Celaya v. Halter*, 332 F.3d 1177, 1181 (9th Cir. 2003) (pain complaints properly
2 rejected where the ALJ “reasonably noted” evidence that pain had come under control). In
3 October 2014, two months before her Title II eligibility expired, Plaintiff reported that with her
4 current medication regimen, her pain symptoms are adequately managed. AR 37.

5 Accordingly, the ALJ provided clear and convincing reasons for rejecting the claimant’s
6 testimony. *Valentine*, 574 F.3d at 693. The ALJ’s credibility analysis was supported by
7 substantial evidence, and it is entitled to great deference. *See Parra*, 481 F.3d at 750 (“questions
8 of credibility and resolution of conflicts in the testimony are functions solely for the agency.”).

9 **IV. CONCLUSION AND RECOMMENDATION**

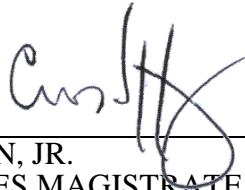
10 Accordingly, IT IS HEREBY RECOMMENDED that Plaintiff’s motion to remand (ECF
11 No. 22) be DENIED.

12 IT IS FURTHER RECOMMENDED that the Commissioner’s cross-motion to affirm
13 (ECF No. 25) be GRANTED.

14 **V. NOTICE**

15 This report and recommendation is submitted to the United States district judge assigned
16 to this case under 28 U.S.C. § 636(b)(1). A party who objects to this report and recommendation
17 may file a written objection supported by points and authorities within fourteen days of being
18 served with this report and recommendation. Local Rule IB 3-2(a). Failure to file a timely
19 objection may waive the right to appeal the district court’s order. *Martinez v. Ylst*, 951 F.2d
20 1153, 1157 (9th Cir. 1991).

21 DATED: August 2, 2019

22 
23 C.W. HOFFMAN, JR.
24 UNITED STATES MAGISTRATE JUDGE

25
26
27
28